(3)

Supreme Court, U.S.
FILED
OCT 10 2003
OFFICE OF THE CLERK

No. 03-101

In the Supreme Court of the United States

GALE NORTON, SECRETARY, UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL., PETITIONERS

v.

SOUTHERN UTAH WILDERNESS ALLIANCE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

THEODORE B. OLSON
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

13 pp

TABLE OF CONTENTS

		Page
I.	This case warrants review because of the legal and practical importance of the question presented	1
II.	There is a clear inconsistency between the decision in this case and decisions of this Court and the Fifth Circuit	4
III.	This case squarely presents the question whether Section 706(1) permits courts to direct how an agency exercises its discretion on a programmatic basis	6

TABLE OF AUTHORITIES

Cases:

Bennett v. *Spear*, 520 U.S. 154 (1997)	6
City of Boerne v. *Flores*, 521 U.S. 507 (1997)	2
Estelle v. *Gamble*, 429 U.S. 97 (1976)	2
FCC v. *Pottsville Broad. Co.*, 309 U.S. 134 (1940)	3
Gulf Oil Corp. v. *Copp Paving Co.*, 419 U.S. 186 (1974)	2
Land v. *Dollar*, 330 U.S. 731 (1947)	2
Larson v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949)	2
Lujan v. *National Wildlife Fed'n*, 497 U.S. 871 (1990)	2, 5, 7, 9
Marsh v. *Oregon Natural Res. Council*, 490 U.S. 360 (1989)	9
NAACP v. *Secretary of Hous. & Urban Dev.*, 817 F.2d 149 (1st Cir. 1987)	6
Sierra Club v. *Peterson*, 228 F.3d 559 (5th Cir. 2000), cert. denied, 532 U.S. 1051 (2001)	4, 5, 6
South Trenton Residents Against 29 v. *Federal Highway Admin.*, 176 F.3d 658 (3d Cir. 1991)	9
U.S. Airways, Inc. v. *Barnett*, 535 U.S. 391 (2002)	2

Constitution and statutes:	Page
U.S. Const. Art. III	3
Federal Land Policy and Management Act of 1976, 43 U.S.C. 1701 *et seq.*	3
43 U.S.C. 1782(c)	6
National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*	3
42 U.S.C. 4332(2)(C)	9
Administrative Procedure Act, 5 U.S.C. 551 *et seq.*:	
5 U.S.C. 553(e)	10
5 U.S.C. 704	9
5 U.S.C. 706	9
5 U.S.C. 706(1)	*passim*
5 U.S.C. 706(2)	2, 3, 4, 6, 10
Miscellaneous:	
Robert L. Stern et al., *Supreme Court Practice* (8th ed. 2002)	2
S. Doc. No. 248, 79th Cong., 2d Sess. (1946)	9

In the Supreme Court of the United States

No. 03-101

GALE NORTON, SECRETARY, UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL., PETITIONERS

v.

SOUTHERN UTAH WILDERNESS ALLIANCE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

Respondents Southern Utah Wilderness Alliance et al. (SUWA) do not identify any substantial reason why this Court should decline to consider the important and recurring question presented in this case: whether 5 U.S.C. 706(1)—which authorizes courts to "compel agency action unlawfully withheld or unreasonably delayed"—permits judicial review of the adequacy of an agency's day-to-day management of public lands for compliance with general statutory standards and its own planning documents. Indeed, SUWA acknowledges that the Ninth Circuit, like the Tenth Circuit in this case, has recently extended Section 706(1) to such claims, thereby underscoring the broad importance of the question presented here. See Br. in Opp. 23-24; Pet. 9-10, 26-27.

I. THIS CASE WARRANTS REVIEW BECAUSE OF THE LEGAL AND PRACTICAL IMPORTANCE OF THE QUESTION PRESENTED

SUWA initially contends that the interlocutory posture of this case renders it unsuitable for this Court's review. Br. in Opp. 10-13. SUWA is mistaken.

This Court frequently grants certiorari to resolve important threshold questions when, as here, a federal court of appeals has reversed the grant of a motion for dismissal or summary judgment and remanded the case for further proceedings. See, *e.g.*, *Verizon Communications* v. *Law Offices of Curtis V. Trinko, LLP*, No. 02-682 (to be argued Oct. 14, 2003); *Raytheon Co.* v. *Hernandez*, No. 02-749 (argued Oct. 8, 2003); *US Airways, Inc.* v. *Barnett*, 535 U.S. 391, 395 (2002); *City of Boerne* v. *Flores*, 521 U.S. 507, 523 (1997); *Estelle* v. *Gamble*, 429 U.S. 97, 98 (1976); *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186, 191-193 (1974); *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 684-685 (1949); *Land* v. *Dollar*, 330 U.S. 731, 734 (1947); see also Robert L. Stern et al., *Supreme Court Practice* 259-260 (8th ed. 2002). The Court granted certiorari in precisely that posture in *Lujan* v. *National Wildlife Federation*, 497 U.S. 871, 881-882 (1990), which also involved a programmatic challenge to an agency's land management activities and a court of appeals' failure to adhere to the "final agency action" requirement of the Administrative Procedure Act (APA).

The purely legal question presented here concerning the scope of Section 706(1) was definitively addressed below in both the majority opinion and the partial dissent. Neither of those opinions suggests that the court of appeals' holding on *that* question might be subject to revision once the district court conducts a trial on the merits of SUWA's claims.[1]

The question is one of considerable importance. The use of Section 706(1) endorsed by the Tenth Circuit permits courts to engage in wide-ranging review of an agency's on-

[1] After the certiorari petitions were filed, SUWA amended its complaint to add claims under 5 U.S.C. 706(2). See Br. in Opp. App. 27-47. That amendment does not, as SUWA suggests, militate against the Court's consideration of the question presented concerning the scope of 5 U.S.C. 706(1). See Br. in Opp. 12 & n.6. The amended complaint continues to advance the same claims under Section 706(1) that gave rise to the court of appeals' decision sought to be reviewed here.

going administration of a program, to order systemic changes in an agency's operations that were not specifically prescribed by Congress or sought from the agency, and to reorder an agency's priorities for the allocation of scarce resources. See Pet. 27-28. That vision of the relationship between courts and agencies is fundamentally inconsistent with Congress's choice in the APA to confine judicial intervention to cases seeking to compel under Section 706(1), or to set aside under Section 706(2), a discrete final agency action in the nature of a rule, order, or license. See Pet. 10-19. It is also fundamentally inconsistent with the role of Article III courts under the Constitution. See, *e.g.*, *FCC* v. *Pottsville Broad. Co.*, 309 U.S. 134, 141 (1940).

Deferring review of the question presented could produce significant disruption both in this case and more generally. The court of appeals remanded this case for further proceedings on SUWA's claims under Section 706(1) to compel BLM to perform a variety of tasks allegedly required under general provisions of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. 1701 *et seq.*; the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, and BLM's own planning documents. See Pet. App. 2a-3a, 39a.[2] Those proceedings, together with any subsequent appellate review, threaten to be protracted, to divert agency personnel and resources from other endeavors, and to constrain the agency from managing public lands in accordance with its expert judgment as intended in FLPMA. As SUWA acknowledges, if the government defendants in

[2] SUWA suggests that its Section 706(1) claim to compel BLM to comply with its land use plans might be mooted by BLM's completion of tasks identified in those plans. See Br. in Opp. 13. In view of the breadth of that claim (see *id.* App. 20, 42-43), which is not confined to the two monitoring and planning tasks sought at the preliminary injunction stage, there is no reason to believe that the claim would be mooted by BLM's completion of those tasks. See Pet. App. 31a n.17 (noting government's argument that some portions of SUWA's claim were moot).

this case do not conform their conduct to the lower courts' conception of what constitutes, for example, management of public land to prevent "impairment," the potential exists for them to be held in contempt or to face other coercive sanctions. See Br. in Opp. 11-12. Moreover, the decisions of the Ninth and Tenth Circuits stand as binding precedent authorizing judicial intervention on a wide-ranging basis in a broad range of federal programs.

II. THERE IS A CLEAR INCONSISTENCY BETWEEN THE DECISION IN THIS CASE AND DECISIONS OF THIS COURT AND THE FIFTH CIRCUIT

SUWA contends that this Court's review is not warranted because the Tenth Circuit's decision does not "direct[ly] conflict" with this Court's decision in *Lujan* and the Fifth Circuit's en banc decision in *Sierra Club* v. *Peterson*, 228 F.3d 559 (2000), cert. denied, 532 U.S. 1051 (2001). See Br. in Opp. 13-15. Although the question presented here is sufficiently important to warrant review without regard to any conflict, the Tenth Circuit's decision does conflict with both the basic reasoning of *Lujan* and the holding of *Peterson*.

A. SUWA seeks to distinguish *Lujan* as a case arising under Section 706(2). Br. in Opp. 13. As the petition explains, however, the court of appeals' holding in this case on what constitutes reviewable "agency action" under Section 706(1) cannot be reconciled with *Lujan*'s holding on what constitutes reviewable "agency action" under Section 706(2). See Pet. 11-12. SUWA does not attempt to justify giving the term "agency action" a broader meaning in Section 706(1) than in Section 706(2), or applying Section 704's restriction of judicial review under the APA to "final" agency action only to Section 706(2) and not to Section 706(1).

SUWA suggests that *Lujan* is inapposite because it "deals exclusively with standing." Br. in Opp. 13. But *Lujan* explains that an essential component of the APA standing inquiry is whether the plaintiff "identif[ies] some 'agency action'" to which his suit is directed. 497 U.S. at 882. And when, as in that case and this one, review is sought "only under the general review provisions of the APA," the plaintiff must direct his suit to "final agency action." *Ibid.* The Court's conclusion that BLM's ongoing management of public lands is not "an identifiable 'agency action'—much less a 'final agency action'"—under the APA was thus central to the holding in *Lujan*, *id.* at 890, 891, and is controlling here.

SUWA contends that its challenge to aspects of BLM's management of public lands in Utah is narrower than the challenge in *Lujan* to aspects of BLM's management of public lands nationwide. See Br. in Opp. 13-15. That is a distinction without a difference. The essence of this Court's holding in *Lujan* is that the APA permits courts to "intervene in the administration of the laws only when, and to the extent that, a specific 'final agency action' [that] has an actual or immediately threatened effect" is at issue. 497 U.S. at 894. Here, as in that case, SUWA has not directed its APA challenge to such "specific 'final agency action.'"

B. SUWA offers no viable ground on which to reconcile the decisions in this case and *Peterson*, which rejected a Section 706(1) challenge to the Forest Service's timber management practices. Nothing in the Fifth Circuit's analysis of the Section 706(1) question in *Peterson* turned, as SUWA suggests, on whether the plaintiffs' claims involved "every acre of the Texas national forests" or "tried to use *past* legal violations to enjoin all *future* timber sales." Br. in Opp. 15; see *Peterson*, 228 F.3d at 568. Although SUWA further contends that *Peterson* involved "affirmative agency actions" whereas this case involves "true failures to act" (Br. in Opp. 15), such distinctions are essentially semantic, as the Fifth Circuit recognized. See 228 F.3d at 568 ("Almost any objection to an agency action can be dressed up as an agency's failure to act."). Indeed, both this case and *Peterson* involve claims that an agency "has been acting, but the environ-

mental groups simply do not believe its actions have complied with the [governing statute]." *Ibid.*[3]

III. THIS CASE SQUARELY PRESENTS THE QUESTION WHETHER SECTION 706(1) PERMITS COURTS TO DIRECT HOW AN AGENCY EXERCISES ITS DISCRETION ON A PROGRAMMATIC BASIS

SUWA contends that this case does not implicate the question presented in the petition because it is not a "broad programmatic challenge," but a suit to compel "final agency action." Br. in Opp. 17-21. That contention cannot be squared with SUWA's own complaint and with a proper understanding of the courts' authority under Section 706(1).

A. The complaint makes clear that SUWA is not merely seeking a court order that directs BLM to complete some discrete "agency action" that has been unlawfully withheld, much less agency action that is "final" in the sense of "mark-[ing] the 'consummation' of the agency's decisionmaking process" and carrying legal consequences. *Bennett* v. *Spear*, 520 U.S. 154, 177-178 (1997). SUWA is instead seeking to have the district court interject itself into many aspects of BLM's ongoing management of public lands in Utah.

Consider, for instance, SUWA's claim under Section 706(1) that BLM has failed to comply with FLPMA's general requirement that wilderness study areas be managed "so as not to impair the[ir] suitability * * * for preservation as wilderness," 43 U.S.C. 1782(c).[4] With respect to that claim,

---

[3] As SUWA observes (Br. in Opp. 22-23), a decision of the First Circuit allowed an agency's "*pattern* of behavior" to be challenged under Section 706(1) and Section 706(2). See *NAACP* v. *Secretary of Hous. & Urban Dev.*, 817 F.2d 149, 158, 160-161 (1987) (Breyer, J.). That decision predated *Lujan*'s analysis of the "final agency action" limitation to judicial review under the APA.

[4] SUWA takes issue with the characterization of FLPMA's non-impairment standard as a "general" one. See, *e.g.*, Br. in Opp. 2, 14. The court of appeals recognized, however, that FLPMA leaves BLM with broad discretion regarding the interpretation and implementation of that

the complaint alleges simply that "BLM has in the past, and continues today to permit [off-road vehicles] to impair the suitability of existing [wilderness study areas] from entry into the national wilderness preservation system," and identifies four areas as "example[s]." Br. in Opp. App. 21, 44. The claim can only be understood as seeking "a general judicial review of the BLM's day-to-day operations" concerning off-road vehicle management—the very sort of claim that *Lujan* characterized as an impermissible "programmatic" challenge, as distinguished from a permissible challenge to discrete "final agency action." 497 U.S. at 890-891, 899.[5]

B. SUWA contends that the relief sought on its Section 706(1) claims is "final agency action," so that this case does not present the question whether action that is not of that character may be compelled under Section 706(1). See Br. in Opp. 18-21. That is not so.

First, SUWA's complaint does not identify *any* "final agency action" that is required by FLPMA and that SUWA

---

standard. See Pet. App. 12a-14a; see also *id.* at 7a n.4 (observing that "FLPMA does not explain what the terms 'preservation,' 'wilderness,' or 'impair' mean"); *id.* at 41a (McKay, J., dissenting in part) ("The majority * * * concedes that the BLM's nonimpairment obligation is generally stated and involves a substantial amount of discretion in the manner in which the BLM meets its obligation.").

[5] Nor are SUWA's remaining claims under Section 706(1) "direct[ed] * * * against some particular 'agency action' that causes it harm." *Lujan*, 497 U.S. at 891. For example, in seeking to compel BLM to conform to its land use plans, SUWA's Second Amended Complaint refers generally to "duties and commitments to manage [off-road vehicles]," which are alleged to "include" such tasks as "the preparation of detailed [off-road vehicle] implementation plans and/or [off-road vehicle] travel plans, the preparation of maps and other informational materials for distribution to the public, the creation of monitoring plans and protocols, and the marking and signing of designated trails." Br. in Opp. App. 20; see *id.* App. 39-41, 42-43 (Third Amended Complaint). Those allegations illustrate that SUWA is seeking wide-ranging judicial intervention into BLM's day-to-day management of public lands, even down to the level of posting signs and distributing literature.

is seeking to compel under Section 706(1). The mere fact that BLM could take some "final agency action" in its management of the wilderness study areas—such as issuing a rule excluding off-road vehicles from a particular area—does not make SUWA's general claim that BLM has not prevented impairment of those areas one to compel a particular "final agency action" that has been "unlawfully withheld" within the meaning of Section 706(1). Similarly, although BLM might choose to take "final agency action" in connection with the "implementation plans" and "travel plans" called for in its land use plans, that does not make SUWA's general claim that BLM has not complied with its land use plans one to compel "final agency action."[6]

Second, SUWA errs in attempting to analogize its request to bar off-road vehicles in wilderness study areas to a request to compel final agency action. See Br. in Opp. 18. Nothing in FLPMA (or any other provision of law) requires BLM to close wilderness study areas to off-road vehicles; whether to do so is left to BLM's "considerable discretion over how it might address activity causing impairment." Pet. App. 12a (noting SUWA's concession to that effect). An injunction ordering BLM to take such action, therefore, would not direct BLM simply *to act*, but would direct BLM

[6] Perhaps in an attempt to portray its Section 706(1) claims as narrower than they actually are, SUWA focuses on the particular relief sought in its preliminary injunction motion, not on the more general claims asserted in its complaint. See, *e.g.*, Br. in Opp. 14, 17, 18. The district court, however, dismissed four of SUWA's underlying claims with prejudice, and then denied SUWA's preliminary injunction motion as moot. See *id.* App. 48-49. The court of appeals reinstated those claims. For purposes of determining whether this case raises the question presented in the petition, therefore, the Court's inquiry cannot be confined to SUWA's preliminary injunction motion, but must consider the Section 706(1) claims as alleged in SUWA's complaint. In any event, even if this case were understood to be seeking only the relief sought in the preliminary injunction motion, such relief still would not be within the scope of Section 706(1).

how to act, substituting the court's discretion for the agency's. Under Section 706(1), however, "[t]he court may require agencies to act, but may not under this provision tell them how to act in matters of administrative discretion." S. Doc. No. 248, 79th Cong., 2d Sess 40 (1946); see Pet. 15-17.

Third, SUWA's assertion that a supplemental environmental impact statement (SEIS) under NEPA "has always been treated by this Court and others as a final and challengeable action" is incorrect and unsupported by the cases on which SUWA relies. Br. in Opp. 20. None of those cases presented a freestanding claim under Section 706 to compel or to set aside a SEIS. They instead involved a challenge to a decision to undertake a "major Federal action[]," 42 U.S.C. 4332(2)(C)—the construction of a dam (*e.g.*, *Marsh* v. *Oregon Natural Res. Council*, 490 U.S. 360 (1989)) or a highway (*e.g.*, *South Trenton Residents Against 29* v. *Federal Highway Admin.*, 176 F.3d 658 (3d Cir. 1999))—on the ground, among others, that a SEIS had not been prepared. Nothing in those cases suggests that a SEIS is itself "final agency action." Rather, a SEIS is a "preliminary, procedural, or intermediate agency action" that is "not directly reviewable" under the APA, but "is subject to review on the review of the final agency action," 5 U.S.C. 704, such as the decision to proceed with the dam, highway, or other "major Federal action." See Pet. 20-22.

In any event, even if a request to compel some discrete "final agency action" were included in SUWA's claims, that would not bring the entirety of those claims within the proper scope of Section 706(1). See *Lujan*, 497 U.S. at 892-893 ("[T]he flaws in the entire 'program' * * * cannot be laid before the courts for wholesale correction under the APA, simply because one of them that is ripe for review adversely affects one of respondent's members.").

C. Finally, SUWA suggests that any "mandatory statutory duty" is enforceable under Section 706(1) in a suit such as this one. Br. in Opp. 21-25. Section 706(1), by its terms,

authorizes courts *only* to compel particular "agency action" that has been "unlawfully withheld or unreasonably delayed," not to enforce general statutory provisions standing alone. The APA contemplates the enforcement of such general provisions only in the context of judicial review of final agency action under Section 706(2). If a party such as SUWA believes that an agency should take final agency action to implement a statutory standard, the party may petition the agency for a rulemaking. See, *e.g.*, 5 U.S.C. 553(e). If the petition is denied, the party may seek judicial review under Section 706(2) based on the agency's explanation and the administrative record. And if the agency delays unreasonably in responding to such a petition, Section 706(1) may come into play to compel the agency to respond, although not how to respond. But the APA does not allow a party to bypass those orderly procedures by bringing a programmatic challenge directly in federal court.[7]

* * * * *

For the reasons stated above and in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

OCTOBER 2003

---

[7] SUWA appends to its brief three extra-record letters from one of its lawyers to BLM personnel. See Br. in Opp. App. 50-57. Those letters do not constitute a formal request for BLM to issue a rule closing areas to off-road vehicle use or to take other final agency action. And, even if they did, SUWA's only possible remedy under Section 706(1) would be an order to compel BLM to respond to those letters within a reasonable time.